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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. 234

PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET DE GRAFFENREID,
Petitioners,

vs.

STATE OF NORTH CAROLINA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT OF PETITION.

I. DUKE AVNET,
WILLIAM R. DALTON,
HAROLD BUCHMAN,
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SUBJECT INDEX

Petition for Writ of Certiorari

Brief in Support of Petition for Writ of Certiorari

Table of Cases

Table of Statutes

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PETITION FOR WRIT OF CERTIORARI.

The petitioners, Philip Milton Koritz, Cal Roberson Jones, and Margaret De Graffenreid, respectfully petition this Honorable Court for a Writ of Certiorari to the Supreme Court of North Carolina.

STATEMENT OF THE MATTER INVOLVED.

This case presents serious questions relating to the constitutional rights under the Fourteenth Amendment of the Federal Constitution to trial in a state court by a jury free from arbitrary and systematic exclusion and limitation of Negro and white citizens.

From the heat engendered by picket line controversies during the course of a labor dispute arose the arrest of the petitioners for allegedly resisting an officer in performance of his duty.

Margaret De Graffenreid, one of the petitioners, was on August 23, 1946, in a picket line in front of the premises of her employer, the Piedmont Leaf Tobacco Company, in Winston-Salem, North Carolina. The police arrested her when the picketers allegedly refused to open their ranks to allow a truck to pass. She was charged with individually resisting arrest.

The petitioner, Cal Roberson Jones, who was a passerby, and not engaged in the labor dispute or picketing in any manner, was charged with allegedly refusing to move back while watching the picketers.

The petitioner, Philip Milton Koritz, who was the director of the local union, and who came upon the scene while Jones was being taken away by the police, was arrested for interceding on Jones' behalf.

The ultimate sentence imposed was twelve months on the roads for the petitioner Koritz, ten months on the roads for the petitioner Jones, and eight months on the roads for the petitioner De Graffenreid.

Conviction in the Municipal Court of Winston-Salem on September 4, 1946, was followed by appeal to the Superior Court of Forsyth County. There, by motion to quash the warrants of arrest, and for the discharge of the jury panel, was raised the question of the arbitrary and systematic exclusion of Negro citizens, and the limitation of the number of white citizens for jury service by the Board of County Commissioners for Forsyth County. There was also raised the question of the constitutional validity of the statutory prerequisites for jury service. Considerable testimony was

taken in connection with the motion, and can be briefly summarized as follows.

Jury lists are made up for jury service in Forsyth County, N. C., once every two years by the Board of County Commissioners, from the tax records of the County. Forsyth County in 1945 (the last year in which the biennial jury lists were prepared) had a population of 150,000 persons, 45 percent of which were colored. *Yet evidence adduced showed that no Negro had been summoned for service on the grand or petit juries for the October Term, 1946, the term at which the case at bar was tried. The uncontradicted testimony of the Sheriff of Forsyth County, who was charged with the responsibility for service of all jurors, was that a dozen colored persons in all had been summoned for jury service over a period of the past ten years.* An active trial lawyer, Mr. Slawter of Winston-Salem, with 31 years' experience, was unable to state whether there had been as many as ten colored jurors actually serving on grand and petit juries in the past 10 years.

The Board of County Commissioners, by their own admission, maintained separate lists for colored jurors for the biennal years 1941 to 1945. Of a total number of approximately 4,078 jurors serving over a period extending from October 1936 to October 1946, approximately 12 were of the Negro race.

As will appear in detail from a table contained in the petitioners' brief (Pages 32, 33), 90 percent to 95 percent of eligible Negro jurors, and 55 percent of eligible white jurors, were subjected to arbitrary discrimination and exclusion from the jury listings prepared by the County Commissioners for the said 10-year period.

With regard to the provisions of the North Carolina Statutes claimed to be unconstitutional, Chapter 9 thereof

restricts the jury lists to taxpayers who are either property owners or poll-tax payers. Furthermore, poll-tax payers include only males between the ages of 21 and 50. Therefore, if a male over 50 possesses no property, he is excluded from the jury lists by the terms of the statute. There is an additional requirement that talesmen be freeholders.

The Superior Court of Forsyth County nevertheless made a finding that no discrimination had been shown. Then, since only six jurors had been drawn from the regular panel, the court ordered the Sheriff to summons 25 additional veniremen, not less than ten of whom he directed should be Negroes. The Sheriff summoned the 25, including ten Negroes. Exceptions were taken to this affirmative order of the Court, and appear in the record, notwithstanding claims made by the State and the Supreme Court of North Carolina that the petitioners assented to the procedure pursued. The Supreme Court of North Carolina found no error on the appeal, stating that the finding of the Court below of the non-existence of discrimination was supported by the evidence, even though there was no contradiction by the State of the evidence of discrimination above described. The Supreme Court of North Carolina declared that the petitioners had been contented with the jury drawn, although such contentment is definitely not discernible in the record, and was not expressed in fact, as appears from the exceptions taken to the Court's order and rulings. Further grounds given were that the white petitioner, Koritz, had no reason to complain of discrimination, and that no constitutional defects were found in the North Carolina statutes.

THIS COURT HAS JURISDICTION.

This Court has jurisdiction under Sec. 237 (b) of the Judicial Code (U. S. Code, Title 28, Sec. 344b). The Supreme Court of North Carolina decided this case on June 5, 1947, and certified its decision on June 12, 1947.

THE QUESTIONS PRESENTED.

1. Did the Board of County Commissioners of Forsyth County arbitrarily and systematically discriminate against Negro and white citizens in jury selection contrary to the Fourteenth Amendment of the Federal Constitution and the laws thereunder?

2. Do the Statutes of North Carolina permitting discrimination against white and Negro citizens in jury selection violate the Fourteenth Amendment of the Federal Constitution?

3. Did the Superior Court of Forsyth County deprive the petitioners of their constitutional rights under the Fourteenth Amendment of the Federal Constitution in directing the Sheriff to summons a specified number of Negro veniremen?

4. Was the white petitioner, Philip Milton Koritz deprived of his constitutional rights under the Fourteenth Amendment of the Federal Constitution to the same extent as the Negro petitioners?

5. Did the petitioners invoke the proper procedure to challenge the validity and constitutionality of the practices used by the County and the Court in drawing and selecting the jury?

REASONS RELIED UPON FOR ALLOWANCE OF WRIT.

The almost total absence of Negroes from juries in Forsyth County for a period of ten years—which evoked no contradiction from the State—would, standing by itself, indicate discrimination in a county whose colored population equaled 45 percent of the total. And the presence of only 12 Negroes on juries over a period of ten years, is, it is submitted, the equivalent of total exclusion. Hill v. Texas, 316 U. S. 400; Smith v. Texas, 311 U. S. 128. In addition, the exclusion of between 90 percent and 95 percent of otherwise eligible Negro citizens, and 55 percent of otherwise eligible white citizens, from jury lists prepared by the County Commissioners from tax records furnishes convincing proof of intention to discriminate and confine the jury service to a small, selective circle. Such actions as maintaining a separate list of jurors marked "colored" denote active discrimination. The full factual appraisal of the incontrovertible existence of systematic and arbitrary exclusion of Negro and white jurors is developed at length by the petitioners in their supporting brief. These practices are in sharp conflict with the decisions of this court, which has declared such systematic and arbitrary discrimination violative of the Fourteenth Amendment. The Supreme Court of the United States has been careful to assume jurisdiction in a number of cases where, as in the case at bar, evidence appeared that over a course of years, there had been systematic and discriminatory exclusion of members of the Negro race from jury panels. Hill v. Texas, *supra;* Smith v. Texas, *supra;* Pierre v. Louisiana, 306 U. S. 354; Neal v. Delaware, 103 U. S. 370; Norris v. Alabama, 294 U. S. 587.

The Supreme Court of North Carolina merely accepted the conclusions of the Superior Court of Forsyth County

that no discrimination had been shown, ignoring completely the agreed stipulation summarized in the petitioners' brief (Pages 32, 33), and the testimony of County officials, showing flagrant and systematic exclusion.

In its opinion, the Supreme Court of North Carolina made reference to the alleged contentment of the petitioners with the jury selected, because of failure to exercise one remaining peremptory challenge. But ten or more peremptory challenges would have been unavailing in providing a jury fairly and impartially drawn from the community and free of discrimination. Furthermore, the petitioners fully reserved their objection, as noted in the record. The remarks of the Supreme Court of North Carolina are consequently incomprehensible in this connection to the petitioners.

While it is true that earlier decisions of this court have apparently recognized State requirements of property ownership, tax payments, etc., as constitutional conditions precedent to jury service, yet it is submitted that present considerations call for a re-examination of these disqualifying provisions. Where grave economic conflicts arise in communities, the exclusion of the propertyless from jury service can make trial by jury a mockery for the humble worker enmeshed in the coils of the law. This is the spirit that animates the decision of this court in Thiel v. Southern Pacific Company, 328 U. S. 136.

From the aforementioned decisions of the Supreme Court, it must necessarily follow that the direction by the Superior Court of Forsyth County to the Sheriff to summons a specified quota of Negro jurors was a flagrant violation of the Fourteenth Amendment. The Court thus attempted by unconstitutional means to cure its condonation of unconstitutional practices. If, as has been held, the systematic exclusion of Negro jurors is discriminatory as

to Negro defendants, simple logic would dictate that the allocation of a specific number of Negro jurors is prejudicial to white defendants. It is not the fixing of quotas for each race which makes for a fair trial by jury, but the absence of exclusionary practices against any race, class, or group of persons otherwise eligible that insures fairness in trial by jury.

The white petitioner, Philip Milton Koritz, was tried in a cause consolidated at the request of the State, and was consequently equally prejudiced, along with the Negro petitioners, by the exclusion of Negro and white jurors. While it is a novel question, that is, whether in a consolidated case, a white defendant stands on the same ground as his Negro co-defendants with respect to exclusionary practices, it is clear that, first of all, the white petitioner was involved in union activity covering largely Negro workers. An analogy can be drawn between the prejudice directed at him by a tainted jury and the property loss suffered by a white citizen from a segregation ordinance. Buchanan v. Worley, 245 U. S. 60.

If the jury in the consolidated case was lacking in propriety because of its foundation on discriminatory practices, then the jury was unfit to try any of the defendants, including Koritz. And in Thiel v. Southern Pacific Company, *supra;* Glasser v. U. S., 315 U. S. 60; Ballard v. U. S., 67 S. Ct. 261, prejudice to the defendant was not considered a necessary factor if the jury were unconstitutionally drawn.

The petitioners first raised the questions of the constitutionality of the statutes of North Carolina and the practices of the Board of County Commissioners of Forsyth County, in jury selection, by filing their motion to quash prior to the trial of the cause. This procedure has been followed in numerous cases coming to this court from common law

jurisdictions. Hill v. Texas, *supra;* Norris v. Alabama, *supra;* Neal v. Delaware, *supra.* The State of North Carolina is a common law State. General Statutes of North Carolina, Chap. 4, Sec. 1. Furthermore, the Supreme Court of North Carolina sanctions such procedure. State v. Kirksey, 227 N. C. 445; State v. Peoples, 131 N. C. 784; State v. Daniels, 134 N. C. 641.

The Supreme Court of North Carolina, in its opinion in this case, expressed the view that the petitioners had expressed their satisfaction with the jury drawn by failing to utilize all their peremptory challenges and one more. The Court added that the petitioners had agreed to the summoning of a special venire of twenty-five, of whom not less than 10 should be colored, in order to provide enough prospective jurors. The petitioners contend, however, that by their motion to quash, and their exception to the Court's order to summon the special venire, they properly challenged the array, as provided for by North Carolina practice. State v. Kirksey, *supra;* State v. People's, *supra;* State v. Daniels, *supra.* Any inference of satisfaction with the jury or waiver of the petitioners' rights is vigorously denied on the basis of the exceptions interposed.

This procedural technicality (which is unsound and was not urged by the State itself on appeal to the Supreme Court of North Carolina) should not under any circumstances preclude this court from consideration of serious questions involving basic and fundamental constitutional rights. Hormel v. Helvering, 312 U. S. 552.

Shameful miscarriages of justice by juries which are not representative of the community, and which are not constitutionally selected, will continue without end if the facade of legality, such as erected in this case by the public officials of Forsyth County, is allowed to obscure violations of the Fourteenth Amendment.

Equality under the law will remain a meaningless term in Forsyth County if its officials are not required to yield to the compulsions of the Fourteenth Amendment.

Respectfully submitted,

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HAROLD BUCHMAN,

Attorneys for Petitioners.

IN THE

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No. .....

PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET DE GRAFFENREID,
Petitioners,

vs.

STATE OF NORTH CAROLINA,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION BELOW.

The opinion of the Supreme Court of North Carolina is reported in 227 N. C. 552, and is reproduced below:

> *"Supreme Court of North Carolina—Spring Term,* 1947, No. 723—*State vs. Philip Milton Koritz, Cal Roberson Jones, and Margaret DeGraffenreid.*
>
> Appeals by defendants from Rousseau, J., October Term, 1946, of Forsyth.
>
> Criminal prosecutions on four separate warrants charging the defendants, Philip Milton Koritz, Cal

Roberson Jones, Margaret DeGraffenreid, and Betty Keels Williams, severally, with resisting, delaying or obstructing a police officer of the City of Winston-Salem in discharging or attempting to discharge a duty of his office in violation of G. S. 14-223, consolidated and tried together as all of the alleged offences arise out of the same transaction or the same series of transactions.

The cases were tried originally in the Municipal Court of the City of Winston-Salem and again *de novo* on appeal to the Superior Court of Forsyth County.

When the cases were called and consolidated for trial in the Superior Court, the defendants first interposed a motion to quash the warrants and to discharge the panel of petit jurors because of discrimination against the Negro race in making up the jury list from which the jurors were summoned for the term. Three of the defendants are Negroes; one is a White man. Several days were consumed in hearing the motion, with both sides offering evidence in respect of the matter.

The defendants offered evidence tending to show, according to their contention, that the number of Negroes selected for jury service out of the total number of eligible Negroes in the County was disproportionately small to the number of Whites selected in the same manner, and that the use of separate tax lists for Whites and Negroes was discriminatory against both races. Out of 23,450 possible eligible White jurors, only 10,367 names appear in the box; and out of 4,900 possible Negro jurors only 255 names are in the box. The result is discrimination against both races, so the defendants say.

The State, on the other hand, offered evidence tending to show, so it contends, that there was no studied or deliberate discrimination against either race on the part of the jury commissioners, and that the large number of Whites as compared with the number of Negroes who were actually selected for jury service

was not the result of any prejudice or intentional discrimination against the latter race. Walter A. Mickle, the County-City Tax Collector, and former deputy sheriff who assisted in the annual drawing of juries from 1936 to 1946 says: 'I never heard any commissioner discuss whether a man was black or white, that I remember, during the time I was in the office as Chief Deputy, at the drawing of the jury.'

After hearing the evidence, the trial court made the following findings:

1. That as the defendants are being tried upon warrants, and not upon bills of indictment, the method of selecting grand juries in Forsyth County is not germane to the present motion.

2. That a fair representation of Negroes was placed in the jury box by the commissioners, and that there was no intentional discrimination in preparing the jury list either in respect of color or religion.

The court thereupon overruled the motion to quash the warrants and the jury panel. Defendants excepted to the findings and rulings. Exceptions Nos. 1 and 2.

Announcement was then made that each defendant would have six peremptory challenges, making a total of 24, and that there were only 20 regularly drawn and summoned jurors. The court ordered that 25 talesman be summoned, not less than ten of whom should be Negroes. On inquiring of counsel for defendants whether the talesmen should be drawn from the box or summoned by the sheriff from among the persons qualified to act as jurors in the County, counsel for the defendants, Mr. Avnet, replied: 'In the light of our motion, I would not care to indicate; just leave that matter for your Honor.' It was agreed that a venire of 25 would be sufficient, but defendants excepted to the order. Exception No. 3.

The jury as finally selected was composed of seven Whites and five Negroes. Six were taken from those regularly drawn and summoned for the term, and six from the special venire. The defendants used 23 of

their 24 peremptory challenges, one being in respect of a Negro on the special venire. They still had one peremptory challenge left when the jury was completed. The court found that the proportion of Negroes on the jury, as finally selected, was generous to that race. Exception by the defendants. Exception No. 4.

Verdicts: Guilty as to Philip Milton Koritz, Cal Roberson Jones, and Margaret DeGraffenreid. Not guilty as to Betty Keels Williams.

Judgments: 12 months on the roads as to Philip Milton Koritz; 10 months on the roads as to Cal Roberson Jones; and eight months on the roads as to Margaret DeGraffenreid.

The defendants appeal, assigning errors.

Attorney-General McMullan, and Assistant Attorneys-General Bruton, Rhodes, and Moody, for the State.

William Reid Dalton, I. Duke Avnet, and Harold Buchman, for defendants.

Stacy, C. J. The defendants have abandoned all their exceptions, save the first four which go to the competency of the petit jurors selected to try the consolidated cases. When all is said and done in respect to these exceptions, we are met with the paramount fact that the jury as finally selected was satisfactory to the defendants, and they were not required to take any juror over objection. They announced their contentment with the jury without exhausting all their peremptory challenges. It was composed of 7 White men and 5 Negroes.

In respect of special veniremen summoned to serve as petit jurors, a challenge to the array may be interposed for cause; and if this be overruled, challeges to the polls are still available. S. vs. Kirksey, 227 N. C. 445; S. vs. Levy, 187 N. C. 581; 122 S. E. 386. To present an exception on rulings to challenge to the polls, the appellant is required to exhaust his peremptory challenges and then undertake to challenge another juror. Oliphant vs. R. R., 171 N. C. 303, 88 S. E.

425. The court's action in the matter must be hurtful and its effect unavoidable before it will be held to vitiate the trial. S. vs. Cockman, 60 N. C. 484; S. vs. Benton, 19 N. C. 196.

The trial court was at pains to see that every opportunity was afforded for the selection of a fair and impartial jury. The defendants would be entitled to no more on a new trial, and this they have already had. S. vs. Levy, 187 N. C. 581, 122 S. E. 386; S. vs. Sulton, 142 N. C. 569, 54 S. E. 841; S. vs. English, 164 N. C. 497, 80 S. E. 72; S. vs. Bohanon, 142 N. C. 695, 55 S. E. 797. Their right is not to select but to reject jurors. Having been tried by twelve jurors who were unobjectionable to them, the defendants have no valid ground to urge that they have been prejudiced by the composition of the jury. S. vs. Pritchett, 106 N. C. 667, II S. E. 375; S. vs. Hensley, 94 N. C. 1021. 'The defendant did not exhaust his peremptory challenges . . . When such is the case, the objection to a juror who could have been rejected peremptorily is not available.' S. vs. Bohanon, supra; Oliphant vs. R. R., 171 N. C. 303, 88 S. E. 425.

The trial court was obviously correct in holding that the composition of the grand jury could in no way effect the defendants. They were tried on warrants sworn out in the Municipal Court, and not on bills of indictment returned by the grand jury, as was the case in S. vs. Peoples, 131 N. C. 784, 42 S. E. 814. No rights of theirs were passed upon by the grand jury. The question is put aside as irrelevant. The case of Smith vs. Texas, 311 U. S. 128, 85 L. Ed. 84, strongly relied upon by the defendants, dealt with the composition of a grand jury. It is inapplicable here.

The principal point, argued by the defendants, is the manner in which the petit jurors were selected. Six regular jurors who were summoned for the term did serve on the jury, and it is these jurors of which the defendants now complain, albeit they might have been excused with or without cause. It has been held in a number of cases that mere irregularity on the part

of the jury commissioners in preparing the jury list, unless obviously, designedly, or intentionally discriminatory, would not vitiate the list or afford a basis for a challenge to the array. S. vs. Daniels, 134 N. C. 641, 46 S. E. 743; S. vs. Kirksey, ante. ..... There is a finding on the present record, which is supported by the evidence, that no discrimination was intended or resulted from the manner in which the jury list was prepared. This suffices to sustain the ruling below, in the absence of some pronounced ill consideration. S. vs. Lord, 225 N. C. 354, 34 S. E. (2d) 205; S. vs. Henderson, 216 N. C. 99, 3 S. E. (2d) 357; S. vs. Bell, 212 N. C. 20, 192 S. E. 852; S. vs. Walls, 211 N. C. 487, 191 S. E. 232; S. vs. Cooper, 205 N. C. 657, 172 S. E. 199; Adkins vs. Texas, 325 U. S. 398, 89 L. Ed. 1692; Thomas vs. Texas, 212 U. S. 278, 53 L. Ed. 512.

In no event could the defendant Koritz profit from, or be hurt by, the alleged discrimination against the Negro race, as he is a member of the White race. S. vs. Sims, 213 N. C. 590, 197 S. E. 176.

Moreover, an absolute numerical ratio or balance between the races is not required, nor even possible perhaps. 'Some play must be allowed for the joints of the machine.' M. T. & K. Ry. Co. vs. May, 194 U. S. 267. The problem involves more than mere mathematics or simple arithmetic. Equality can result from disparity in numbers, just as discrimination can result from equality among unequals. Character and intelligence are common to members of both races, with varying degrees of quality, dependent upon the individual, regardless of race. Nor can they be determined or measured by statute. The standard of qualification is prescribed by law. Its application is the place of the rub. The rules of fair play are not difficult to understand. They are only difficult to practice. The end in view is to get a fair cross section of community judgment. Hence, as local officials are in better position than outsiders to weigh the imponderables, their determination of the matter will be upheld unless too wide of the mark or 'unless it is so lacking in support in the evi-

dence that to give it effect would work that fundamental unfairness which is at war with due process.' Adkins vs. Texas, 325 U. S. 398, 89 L. Ed. 1692; Louisville Gas Co. vs. Coleman, 277 U. S. 32.

It is the contention of the defendants, however, that our statutes on the subject contain inherent, constitutional infirmities in that the jury list is taken from the names of taxpayers of the county who are of good moral character and of sufficient intelligence. For this position they rely chiefly upon the recent case of Thiel vs. Southern Pacific Co., 328 U. S. 217, 90 L. Ed. 1181. The cited case is hardly an authority for the position taken. There, the Supreme Court of the United States was exercising a supervisory power over the administration of justice in the Federal Courts, and was not concerned with any constitutional question. To like effect is the decision in McNabb vs. U. S., 318 U. S. 332, 87 L. Ed. 819.

Nor are cases of Norris vs. Alabama, 294 U. S. 587, 79 L. Ed. 1074; Smith vs. Texas, 311 U. S. 128, 85 L. Ed. 84; Glasser vs. United States, 315 U. S. 60, 86 L. Ed. 680, and others cited by the defendants, controlling on the instant record. The present case, in its factual situation, is strikingly similar to the one presented in the case of S. vs. Walls, *supra*, where a like ruling was upheld and on appeal to the Supreme Court of the United States, the decision was left undisturbed, the appeal being dismissed, 302 U. S. 635.

Of course, it is understood that the intentional, arbitrary and systematic exclusion of any portion of the population from jury service, grand or petit, on account of race, color or creed, is at variance with the Constitution and cannot stand. Adkins vs. Texas, 325 U. S. 398, 89 L. Ed. 1692. It is not the right of any party, however, to be tried by a jury of his own race, or to have a representative of any particular race on the jury. It is his right to be tried by a competent jury from which members of his race have not been unlawfully excluded. Ballard vs. United States, 67 S. C. Rep. 261, 91 L. Ed. (Adv. Op) 195. 'The law not only guarantees

the right of trial by jury, but also the right of trial by a proper jury; that is to say, a jury possessing the qualifications contemplated by law.' Hinton vs. Hinton, 196 N. C. 341, 145 S. E. 615.

The broadside challenge to the State's whole method of selecting jurors, regular, special and talesman, calls for only a passing word. There is no mention of race, color or creed in any of the statutes on the subject, and whatever limitations are to be found therein apply equally to all races. It was said as early as Strauder vs. West Virginia, 100 U. S. 303, 25 L. Ed. 664, that within constitutional bounds a state may confine the selection of its jurors 'to males, to freeholders, to citizens, to persons within certain ages, or to persons having educational qualifications.' 31 Am. Jur. 594. The defendants boldly assert that they are immune from trial in Forsyth County so long as the present method of selecting juries obtains therein. The conclusion is a *non sequitur* on the facts as revealed by the record. The challenge is not sustained.

A careful perusal of the record leaves us with the impression that no reversible error has been made to appear in respect of the matters of which the defendants now complain. Hence, the verdict and judgments will be upheld.

No Error."

JURISDICTION.

The jurisdiction of this Court is invoked under Section 237 (b) of the Judicial Code (U. S. Code, Title 28, Sec. 344(b). The Supreme Court of North Carolina has decided a case "where is drawn in question the validity of a statute . . . on the ground of its being repugnant to the Constitution . . . or laws of the United States" . . . and "where . . . title, right, privilege, or immunity is specially set up or claimed . . . under the Constitution . . . or statute of the United States . . ." Judgment was entered in this case by the Supreme Court of North Carolina on June 5, 1947.

STATEMENT OF THE CASE.

The three appellants, together with a fourth co-defendant, Betty Keels Williams, (who was acquitted below) were all arrested for allegedly resisting an officer in the performance of his duty. The arrests developed on August 23, 1946, from a picket line encounter during the course of a strike at the Piedmont Leaf Tobacco Company plant in Winston-Salem.

Tried and convicted by the Municipal Court of the City of Winston-Salem, N. C., on September 4, 1946, without a jury, each of the four defendants filed appeals to the Superior Court of Forsyth County. Upon the call of these four cases by the Solicitor (upon the original warrants) on October 11, 1946, at his request the cases were ordered consolidated.

The defendants then filed their motion to quash the warrants and discharge the petit jury on the ground of discrimination in jury selection (R. p. 12). The evidence of defendants' and State's witnesses, in connection with the motion, comprises the facts relevant to this appeal.

Proof of Discrimination.

The defendants' motion alleged among other things (R. p. 12) that the grand and petit jurors drawn, summoned and serving at the October Criminal Term, 1946, at which they were being tried, consisted of white people only. There was no denial of those allegations and these allegations were proven by testimony of Sheriff Ernie C. Shore (R. p. 27).

The law of the State of North Carolina requires that the jury lists from which the jurors are chosen shall be made up every two years by each county (Ch. 9, General Statutes N. C., 1943, Sec. 1).

A stipulation of counsel was filed (R. p. 17) from which it appears that a total of 51,916 names of prospective jurors were on the biennial jury lists of Forsyth County for the biennial periods of 1935, 1937, 1939, 1941, 1943, and 1945. The stipulation also reveals (R. p. 18) that a separate list of Negroes marked "Colored" was drawn in 1941 and 1945 as prospective jurors. It is uncontradicted that these lists marked "Colored" contained the names of all the colored jurors whose names appeared in the box for the biennial jury lists of 1941 and 1945 (R. p. 39). For the year 1941, the names of only 236 Negroes appear, in a total of 8872 prospective jurors; for the term 1945 (which includes the term of the Court during which the appellants were tried), the names of only 255 Negroes appear in a total of 10,622 prospective jurors.

The Clerk of the Superior Court for Forsyth County, William E. Church, testified he had made a search of his records for the purpose of showing the number of jurors who had been summoned for jury service and the number who had actually served. Based on his testimony, approximately 4,087 jurors, in all, served during the past ten years (R. pp. 30, 31, 32, 33, 34). Of this number a maximum of only twelve was of the Negro race (R. p. 27, Ernie G. Shore, Sheriff for Forsyth County, and see Brief p. 22).

A table is presented at this point illustrating and detailing the evidence of the witness, William E. Church, showing how the above figures are calculated.

Table

From October 12, 1936 through July 11, 1938 (1¾ yrs.)		
Total number summoned (R. p. 32)	1,012	
Excused from service (R. p. 32)	113	
Total serving		899

From July 12, 1938 through January 1, 1942 (3½ yrs.)		
Total number summoned	2,024	
Excused from service	226	
Total serving		1,798
(Note: Witness Church testified that the number summoned and excused for this period was in the same ratio as in the preceding period—R. pp. 32, 33.)		
From January 1, 1942 to (Spring) March 1, 1946 (4-1/6 yrs.)		
Total number summoned	1,204	
(Note: The witness testified that during the War period, the number drawn and summoned was in a ratio of about 50 percent of the number in the preceding periods—R. p. 33.)		
Number excused based on same ratio	134	
Total serving		1,070
From March 1, 1946 to (October term of Court, 1946) October 7, 1946 (7½ mos.)		
Total number summoned	360	
(Note: The witness testified that the number summoned for this period was in the same ratio as in the 1936 to 1938 period—R. p. 33.)		
Number excused	40	
Total serving		320
GRAND TOTAL SERVING FROM OCTOBER 12, 1936, TO OCTOBER 19, 1946 (or a period of ten years)		4,087
TOTAL COLORED SERVING ON JURY DURING 10 YEAR PERIOD	12	
TOTAL WHITE SERVING ON JURY DURING 10 YEAR PERIOD	4,075	
		4,087

The defendants' first witness was Margaret Bell, an employee of the Winston-Salem Chamber of Commerce, who testified that one of her duties was to collect data on the population census of Forsyth County (R. p. 20). She testified further that the last United States census for Forsyth County in 1940 showed a population of 126,475 persons, of whom approximately 45% were colored and 55% were white. An unofficial estimate of the 1946 population advanced by her was 150,000 persons, with 45% being colored.

Virgil W. Joyce, the County Tax Supervisor for Forsyth County since 1938, estimated tax listings, from which the jury lists are required by law to be taken, of 43,000 taxpayers of whom 32,500 are white and 4,000 colored (R. p. 21). He referred to 3,000 additional colored garnishees for poll taxes and an additional 1,000 white persons delinquent in poll taxes only. He estimated that 10% of the tax listers of Forsyth County are women; 3% to 5%, non-residents, and 5% to 10% as guardians and guardian accounts (R. p. 30).

The County-City Tax Collector, Walter A. Mickle, testified that 97% of the taxes levied were collected for the year 1945, including the taxes levied on the 3,000 colored delinquents and the 1,000 white delinquents (R. p. 22).

The Sheriff of Forsyth County (who had held office since 1936) testified that no colored people were drawn or summoned for service on either the petit or grand jury for the present term of the Superior Court of Forsyth County. His office was responsible for the summoning of all jurors. He added, "There haven't been very many colored persons summoned. I would say perhaps a dozen in all colored persons have been summoned from December 7, 1936, when I took office as Sheriff for Forsyth County up until the present time" (R. p. 27). He estimated five had served

on grand juries. He stated that a Negro had been drawn for the criminal jury of the next term, but did not know whether he had been found.

A prominent local lawyer, Mr. John D. Slawter, with an active trial practice of some 31 years, testified that there had been colored jurors, but could not estimate their number. He thought there were more than four or five who had served on the grand jury and petit jury in the past ten years. He could not state whether there had been as many as ten (R. pp. 34, 35). Two other local residents testified that they had been about the courts frequently and saw few, if any, colored persons on the juries over the past few years (R. pp. 25, 39).

The Solicitor for the State admitted that no Negroes served on the Grand Jury in the year 1946 (R. p. 35).

James G. Hanes, Chairman since 1928 of the County Board of Commissioners (which has the responsibility of drawing up the jury lists biennially), testified that he and the other Commissioners turned over the tax cards to the Register of Deeds, who prepared the jury lists (R. p. 41). He disclaimed knowledge of the number of names put into the jury box and stated that he did not inquire about the number put in the jury box but left all of these matters up to Mr. Lentz, the Register of Deeds (R. p. 44). He further testified that in his opinion the figure 8,834, out of a total of 40,000 taxpayers, did not represent an unreasonable and unusually low number of names to go into the jury box for the biennial period commencing in 1941 and that the figure 10,367 did not represent a low percentage of names to go into the jury box for the biennial period commencing in 1945 (R. p. 44). He disclaimed knowledge of the separate lists marked "Colored" (R. p. 43). He declared that he did not know what proportion the colored

population in Forsyth County bore to the total population (R. p. 43). He further testified that all he knew about it was that the names in the jury box contained the same proportion of colored to white as the tax lists did (R. p. 40). He stated that never was there discussion of the color of a juror (R. p. 40). No records were kept of the jurors rejected, but he added "not a great number of them were rejected" (R. p. 43). The percentage rejected for moral character and intelligence, he testified, was very, very small (R. p. 43).

After the Court's rulings and findings of fact, that no discrimination had existed, he ordered 25 talesmen to be summoned, instructing the Deputy Sheriff to include not less than ten Negroes (R. p. 46). The defendants excepted to the Court's instructions and order to the Deputy Sheriff (R. p. 46). In the Court's Findings of Fact, made up after the verdict was returned and after sentence was pronounced, the Court found that the parties had agreed that the Sheriff would summon the 25 talesmen rather than to have their names drawn from the regular jury box (R. pp. 46, 47). The defendants excepted to the Court's full Findings of Fact, which included the aforementioned specific finding (R. pp. 46, 47). Furthermore, when the Court pointedly asked counsel for the defendants whether they wished additional jurors drawn from the regular jury box or from the body of the citizenry by the Sheriff, counsel for the defendants stated that because of their motion to quash the jury panel, they did not care to express any choice, and therefore the choice would have to be left up to the Court (R. p. 47).

Six jurors impaneled in the present case were drawn from the regular panel (Hastings, Brewer, Cooke, Price, Jones and Edwards), and six talesmen (Cuthrell, Hayes, Dymott, Smith, Crowder and Foote) were drawn, five of

whom were Negroes (R. p. 48). The defendants exhausted 23 of their 24 peremptory challenges (R. p. 48).

Jury Statutes of North Carolina.

Chapter 9, *General Statutes, North Carolina* (1943), provides the framework for the selection of jurors.

Section 1 states:

> "The Board of County Commissioners for the several counties at their regular meetings on the first Monday in June, in the year 1905, and every two years thereafter, shall cause their clerks to lay before them the tax returns of the preceding year for their county, from which they shall proceed to select the names of all such persons as have paid all the taxes assessed against them for the preceding year and are of good moral character and of sufficient intelligence. A list of the names thus selected shall be made out by the Clerk of the Board of Commissioners and shall constitute the jury lists, and shall be preserved as such."

Section 2 provides:

> "The Commissioners at their regular meeting on the first Monday in July in the year 1905, and every two years thereafter, shall cause the names on their jury list to be copied on small scrolls of paper of equal size and put into a box procured for that purpose, which must have two divisions marked number one and number two, respectively, and two locks, the key of one to be kept by the sheriff of the county, the other by the chairman of the Board of Commissioners, and the box by the Clerk of the Board."

Section 3 states:

> "At least 20 days before each regular or special term of the Superior Court, the Board of Commissioners of the County shall cause to be drawn from the jury box out of the partition marked No. 1, by a child not more

than ten years of age, 36 scrolls except when the term of court is for the trial of civil cases exclusively, when they need not draw more than 24 scrolls. The persons whose names are inscribed on said scrolls shall serve as jurors at the term of the Superior Court to be held for the county ensuing such drawing, and for which they are drawn. The scrolls so drawn to make the jury shall be put into the partition marked No. 2. The said Commissioners shall at the same time and in the same manner draw the names of 18 persons who shall be summoned to appear and serve during the second week, and a like number for each succeeding week of the term of the said court, unless the judge thereof shall sooner discharge all jurors from further service. The said commissioners may, at the same time and in the same manner, draw the names of 18 other persons, who shall serve as petit jurors for the week for which they are drawn and summoned. The trial jury which has served during each week shall be discharged by the judge at the close of said week, unless the said jury shall be then actually engaged in the trial of a case, and then they shall not be discharged until the trial is determined."

With respect to Forsyth County, Section 4 provides:

". . . the Board of County Commissioners is authorized and empowered to draw as jurors from the box, as provided in the preceding section, an additional number of jurors to those now provided by law . . . At all criminal terms, regular and special, for the first week, 42 jurors shall be drawn and summoned."

Section 7 adds:

"If any of the persons drawn to serve as jurors are dead, removed out of the county, or otherwise disqualified to serve as jurors, the scrolls with the names of such persons must be destroyed, and in such cases other persons shall be drawn in their stead."

Section 11 deals with talesmen:

"That there may not be a defect of jurors, the sheriff shall by order of the court summon, from day to day, of the bystanders, other jurors, being freeholders, within the county where the court is held, or the judge may, in his discretion, at the beginning of the term direct the tales jurors to be drawn from the jury box used in drawing the petit jury for the term, in the presence of the court; such tales jurors so drawn to be summoned by the sheriff and to serve on the petit jury, and on any day the court may discharge those who have served the preceding day. The judge may, upon his own motion, or upon the request of counsel for either plaintiff or defendant, instruct the sheriff to summons such jurors, outside of the courthouse. It is a disqualification and ground of challenge to any tales juror that such juror has acted in the same court as grand, petit or tales juror within two years next preceding such term of court."

Section 24 provides:

"The judges of the Superior Court, at the terms of their courts, except those terms which are for the trial of civil cases exclusively, and special terms for which no grand jury has been ordered, shall direct the names of all persons returned as jurors to be written on scrolls of paper and put into a box or hat and drawn out by a child under ten years of age; whereof the first 18 drawn shall be a grand jury for the court; and the residue shall serve as petit jurors for the court."

These provisions constitute the method of jury selection relevant to a consideration of the record. It may be well to add at this point that General Statutes of North Carolina (1943), Chapter 105, Section 341, provides that "There shall be levied by the Board of County Commissioners in each county a tax of $2.00 on each taxable poll or male person between the ages of 21 and 50 years . . ."

ERRORS RELIED UPON.

1. The Supreme Court of North Carolina erred in holding that the Board of County Commissioners of Forsyth County had not arbitrarily and systematically discriminated against Negro and white citizens in jury selection contrary to the Fourteenth Amendment of the Federal Constitution and laws thereunder.

2. The Court erred in finding that the Statutes of North Carolina permitting discrimination against white and Negro citizens in jury selection did not violate the Fourteenth Amendment of the Federal Constitution.

3. The Court erred in holding that the Superior Court of Forsyth County had not deprived petitioners of constitutional rights under the Fourteenth Amendment of the Federal Constitution in directing the Sheriff to summon a specified number of Negro veniremen.

4. The Court erred in finding that the white petitioner, Philip Milton Koritz, was not deprived of constitutional rights under the Federal Constitution by exclusion of Negroes from the jury.

5. The Court erred in finding that the petitioners failed to invoke the proper procedure to challenge the validity and constitutionality of the practices used by the County and the Court in drawing and selecting the jury.

ARGUMENT.

I.

The Board of County Commissioners of Forsyth County arbitrarily and systematically discriminated against Negro and white citizens in jury selection contrary to the Fourteenth Amendment of the Federal Constitution and laws thereunder.

Whenever by any action of a State, whether through its Legislature, through its Courts, or through its Executive or Administrative officers, persons are excluded solely because of their race or color from serving as grand or petit jurors in criminal prosecutions, the equal protection of the laws is denied to the defendant, contrary to the Fourteenth Amendment of the Constitution of the United States.

This is the settled principle established in a long line of decisions from the United States Supreme Court. *Norris v. Alabama,* 294 U. S. 587 (1935); *Neal v. Delaware,* 103 U. S. 370 (1881); *Smith v. Texas,* 311 U. S. 128; *Hill v. U. S.,* 316 U. S. 400.

This right to a trial by jurors selected without discrimination is further buttressed by Federal statute:

> "No citizens possessing all other qualifications which are or may be prescribed by law shall be disqualified by service as a grand or petit juror in any court of the United States, or of any state, on account of race, color, or previous condition of servitude; and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizens for the cause aforesaid shall, on conviction thereof, be deemed guilty of a misdemeanor, and be fined not more than $5000."
>
> 18 Stat. 336 (1874), 8 U. S. C., sec. 44. See also right of removal to Federal Court, 16 Stat. 144 (1870), 28 U. S. C. sec. 74.

Not that the accused can demand, as a matter of right, a mixed jury, or a pro rata proportion of Negro to White. "What an accused is entitled to demand, under the Constitution of the United States, is that in organizing the grand jury as well as in the impaneling of the petit jury, there shall be no exclusion of his race, and no discrimination against them, because of their race or color." *Martin v. Texas,* 200 U. S. 316 (1906); *Thomas v. Texas,* 212 U. S. 278 (1808).

The question, then, is of the application of these established principles to the facts disclosed by the record.

Did the Board of County Commissioners observe the law in their preparation of the jury lists? The record indicates a vigorous negative. There were 40,500 eligible taxpayers (R. p. 21). Making maximum estimates, much higher than warranted by the record, there were 10% women, 5% non-residents, 7.5% guardian accounts (R. p. 30); assuming a figure of 7.5% as persons disqualified for morals and intelligence (although the record would indicate less (R. p. 43), a total of disqualifications in the neighborhood of 30% could be approximated, making very generous allowances. Deducting a full 30% from the 40,500 eligible taxpayers, leaves 28,350 prospective jurors for the jury lists compiled in 1945. Yet only 10,622 found their way into the jury lists! The case of the missing 17,728 prospective jurors is a serious irregularity that can be charged against the Board of County Commissioners.

Furthermore, it should be observed from the table (R. p. 19) that the total number on the jury list for the biennial period 1945-1947 was about the same as that for the biennial period 1935-1937, and only a little more than that for the 1941-1943 period, although the population of the County had jumped considerably over this period, according to

the U. S. Census Tables. [For the year 1920—77,267; for the year 1930—111,681; for the year 1940—126,475; and an estimate of the population for the year 1946 of 150,000 was made by the Winston-Salem Chamber of Commerce (R. p. 20)].

Confining the examination to the question of discriminated Negroes, if 4,000 were considered the number of paid-up Colored taxpayers, and 30% were removed as disqualified, then a balance of 2,800 should have appeared as eligible for jury service on the jury lists. On the other hand, if the 7,000 were used (including the 3,000 delinquents) then 4,900 would represent the Colored persons who should have been included in the jury list. If the 5,500 figure is utilized allowing for collection of about 50% of delinquent accounts (R. p. 37), then 3,850 Negroes should have been listed for jury service.

But only 255 Colored taxpayers were placed on the 1945 jury list. On the basis of 7,000 eligible Negro jurors, then only 5% were placed on the jury list; on the basis of 2800 eligible, less than 10% were listed; if 3850 were considered eligible, only 7% were listed.

As to the White taxpayers, there were about 23,450 eligible for the jury list, of whom only 10,367 were actually placed thereon, thus omitting over 55% of their number.

To illustrate these figures more graphically, we insert at this point the following Table:

Table

Total number of taxpayers (R. p. 21 Joyce)		43,000
Less firms, corporations, churches, partnerships, etc., listed		2,500
Leaving (net) total number of individuals listed as taxpayers		40,500
Which are made up of: (White)	32,500	
(White) Delinquents	1,000	
(Colored)	4,000	
(Colored) Delinquents	3,000	
	40,500	
Reduced by:		
Non-residents tax listers	3% to 5%	
Women tax listers (R. p. 30 Joyce)	10%	
Guardians for minors tax listers (R. p. 30 Joyce)	5% to 10%	
Taxes uncollected, about (R. p. 22 Mickle)	1.28%	
Tax listers who are not of good moral character and who do not have sufficient intelligence (under GS 9-1) to qualify for jury service	3.72%	
	30.00%	12,150
Thus leaving (net) a total of individual male resident taxpayers of Forsyth County, whose names, under the General Statutes, are entitled to be placed in the jury box of said County		28,350
ACTUALLY TODAY THERE ARE IN THE JURY BOX only		10,622
THUS LEAVING A SHORTAGE (OR DISCREPANCY) OF NAMES NOT IN THE JURY BOX of		17,728

WHITE	33,500
Deduct for women, non-residents, guardians, etc. (Above) (30%)	10,050
	23,450
Total number of White taxpayers whose names are now in the jury box (for 1945-1947) as shown by "Stipulation of Counsel" (R. p. 19)	10,367
(Shortage)	13,083
Percent of White taxpayers whose names are in the jury box	44.28%
Percent of White taxpayers whose names were kept out of the jury box	55.72%
COLORED (NEGROES)	7,000
Deduct for women, non-residents, guardians, etc. (above) (30%)	2,100
	4,900
Total number of Colored taxpayers whose names are now in the jury box (for 1945-1947), as shown by "Stipulation of Counsel" (R. p. 19)	255
(Shortage)	4,645
Percent of Colored taxpayers whose names are in the jury box	5.48%
Percent of Colored taxpayers whose names were kept out of jury box	94.52%

The conclusion to be drawn from the above analysis is that 55% of the white prospective jurors were discriminated against and that from 90% to 95% of the Negroes were subjected to arbitrary discrimination and exclusion in the preparation of jury lists. Could a more flagrant case of discrimination be set forth?

Moreover, no one contradicted the existence of separate lists marked "colored" for the biennial years 1941 and 1945. What was the purpose of such lists? On their face, they segregate on the basis of color a section of the eligibles from the remainder. What could have been the purpose of this segregation except to identify the Negroes as a group on the jury lists in order to limit and to exclude them from service on the juries? What legal justification for this exclusionary practice could there be? Certainly not qualifications of moral character or intelligence, which the Chairman of the Board of County Commissioners stated was responsible for a "very, very small" percentage of rejections (R. p. 43). And, as shown above, there was an abundance of eligible jurors. There was no explanation in the evidence for these separate Negro lists.

The best proof of the results of the Board's practices in effectuating the exclusion of Negroes from juries is what actually occurred. From the lips of the Sheriff himself, who has held office continuously since 1936, it was recorded that no Negroes were summoned or served on the petit or grand jury for the October Term, 1946, which is the term embracing the trial of the case at bar. **His best estimate of the number of colored people summoned for a period of ten years was a dozen persons!** (R. p. 27). A local active trial lawyer, John D. Slawter, who had practiced for 31 years, could not state whether there had been as many as ten colored jurors serving on grand and petit juries in the past ten years (R. p. 34), and two other local citizens, Gene Pratt and Christopher C. Kellum, testified that they had seen few, if any, on the petit juries (R. pp. 26, 39).

A token compliance with the mandate of the Fourteenth Amendment, it is submitted, is equivalent to a studied and complete disregard of the meaning of equal protection of

the law with respect to the selection of jurors. *Hill v. State of Texas*, 316 U. S. 400.

The comment of the Supreme Court in analogous cases is illuminating.

In *Pierre v. Louisiana*, 306 U. S. 354 (1939), the Court stated at page 358:

> "Indictment by grand jury and trial by jury cease to harmonize with our traditional concepts of justice at the very moment particular groups, classes, or races—otherwise qualified to serve as jurors in a community—are excluded as such from jury service. The Fourteenth Amendment entrusts those who because of race are denied equal protection of the laws in a State first to the revisory power of the higher courts of the State, and ultimately to the review of this court."

The above case involved a motion to quash because of discrimination in the method of constituting the grand jury. Petitioner's witnesses testified that between 1896 and 1936 no Negroes had served on grand juries. A venire of 300 in 1936 contained names of three Negroes, one dead; one called for service in January 1937, was the only Negro called for jury service in memory of all witnesses including the Sheriff. About one-half the population of the parish was Negro.

The Court said that the fact that one-half the population was Negro demonstrated that there could have been no lack of colored residents over 21 years of age. . . .

> "There is no evidence on which even an inference can be based that any appreciable number of the otherwise qualified Negroes in the Parish were disqualified for selection because of bad character or criminal records. . . . The testimony introduced by petitioner's own motion to quash create a strong prima facie showing that Negroes had been systematically excluded because of race from the grand jury and the venire from

> which it was selected. Such an exclusion is a denial of equal protection of the laws contrary to the Federal Constitution—the supreme law of the land. . . . Principles which forbid discrimination in the selection of petit juries also cover the selection of grand juries. It is a right to which every colored man is entitled, that, in the selection of juries to pass upon his life, liberty, or property, there shall be no exclusion of his race, and no discrimination against them because of their color."

In *Neal v. Delaware*, 103 U. S. 370 (1881), the Court sustained a motion to quash on the strength of an affidavit alone because (page 397):

> ". . . the fact (so generally known that the court felt obliged to take judicial notice of it) that no colored citizen had ever been summoned as a juror in the courts of the State—although its colored population exceeded 20,000 in 1870 and in 1880 exceeded 26,000, in a total population of less than 150,000—presented a prima facie case of denial, by the officers charged with the selection of grand and petit jurors, of that equality of protection which has been secured by the constitution and laws of the United States. It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because in the judgment of its officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State, and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States."

In *Norris v. Alabama*, 294 U. S. 587 (1934), in an opinion dealing with a motion to quash an indictment, it was said at page 593:

"The State Court rested its decision upon the ground that even if it were assumed that there was no name of a Negro on the Jury roll, it was not established that race or color caused the omission. The Court pointed out that the statute fixed a high standard of qualifications for jurors and that the Jury Commissioner was vested with a wide discretion. The Court adverted to the fact that more white citizens possessing age qualifications had been omitted from the Jury roll than the entire Negro population of the County, and regarded the testimony as being to the effect that the matter of race, color, politics, religion, or fraternal affiliations had not been discussed by the Commission and had not entered into their consideration and that no one had been excluded because of race or color . . . and the Commissioner testified that in the selections for the Jury roll, no one was automatically and systematically excluded on account of race or color; that he 'did not inquire as to color, that was not discussed'."

At Page 594, the Court added:

"But in appraising the action of the Commissioners, these statements cannot be divorced from other testimony. As we have seen, there was testimony, not overborne or discredited, that there were in fact Negroes in the County qualified for jury service. That testimony was direct and specific. After eliminating those persons as to whom there was some evidence of lack of qualifications, a considerable number of those remained. The fact that the testimony as to these persons, fully identified, was not challenged by evidence appropriately direct, cannot be pushed aside. There is no ground for an assumption that the names of these Negroes were not on the preliminary list. The inference to be drawn from the testimony is that they were on that preliminary list, and were designated on that list as the names of Negroes, and that they were not placed on a Jury roll. There was thus presented a test of the practice of the commissioners. Something more than mere general asseverations was

required. Why were these names excluded from the jury? Was it because of the lack of statutory qualifications? Were the qualifications of Negroes actually and properly considered?

"The testimony of the Commissioner leads to the conclusion that these or other Negroes were not excluded on account of age, or lack of esteem in the community for integrity and judgment, or because of disease or of any other qualification. The Commissioner's answer to specific inquiry upon this point was that Negroes were 'never discussed'. . . . We think that the evidence that for a generation or longer no Negro had been called for service on any jury in Jackson County, that there were Negroes qualified for jury service, that according to the practice of the jury commission their names would normally appear on the preliminary list of male citizens of the requisite age, but that no names of Negroes were placed on the jury roll, and the testimony with respect to the lack of appropriate causes of the disqualification of Negroes established the discrimination which the Constitution forbids. The motion to quash the indictment on that ground should have been granted."

Finally, the Supreme Court had to consider a motion to quash on an indictment and conviction for rape in the case of *Smith v. Texas*, 311 U. S. 128 (1940).

In that case the Negroes of the county comprised 20% of the population and 10% of the poll tax payers. A minimum of three to six thousand measured up to qualifications for jury service. From 1931 to 1938, five of 384 grand jurors were Negro. Total number summoned for grand jury service was 512, of whom 18 were Negro. Of the 18 summoned, 13 appeared as the last names on a 16-man jury list, the first 12 of whom were selected.

As a result of this numbering, only five ever served, whereas 339 of the 494 white men summoned actually

served. It also appeared that of the 32 grand juries empaneled, only five had Negro members, while 27 had none, and that of the five, the same individual served three times, so that only three individual Negroes served at all. The tabulation of colored citizens serving on grand juries was as follows: 1931—1; 1932—2; 1933—1; 1934—1; 1935—none; 1936—1; 1937—none; 1938—none.

The Court, passing on these facts, stated at page 130:

> "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community. For race discrimination to result in the exclusion from jury service of otherwise qualified groups not only violates our Constitution and the laws enacted thereunder (18 Stat. 336, 8 U. S. C., sec. 44), but is at war with our basic concepts of a democratic society and a representative government. We must consider this record in the light of these important principles. The fact that the written words of a state's laws hold out a promise that no such discrimination will be practiced is not enough. The Fourteenth Amendment requires equal protection to all must be given — not merely promised. . . . Chance and accident alone could hardly have brought about the listing for grand jury service of so few Negroes from among the thousands shown by the undisputed evidence to possess the legal qualifications for jury service."

The Court stated that the denial by two jury commissioners that they intentionally, arbitrarily or systematically discriminated against Negro jurors was not sufficient.

> "But even if their testimony were given the greatest possible effect, and their situation considered typical of that of the 94 commissioners who did not testify, we would still feel compelled to investigate the decision below. What the Fourteenth Amendment prohibits is racial discrimination in the selection of grand juries. Where jury commissioners limit those from whom

> grand juries are selected to their own personal acquaintance, discrimination can arise from commissioners who know no Negroes as well as from commissioners who know but eliminate them. *If there has been discrimination, whether accomplished ingenuously or ingeniously, the conviction cannot stand.*" (Italics supplied.)

What more appropriate comment could be made with respect to the case at bar?

The Supreme Court of North Carolina, in its opinion, refers to the case of *State v. Walls*, 211 N. C. 487, appeal dismissed, 302 U. S. 635, as being analogous to the case at bar. It is respectfully submitted that an examination of the last cited case reveals no identity with the facts of the present case. In the Walls case, there was no positive evidence as to the exclusion of Negroes in the record, aside from proof that in the preparation of the jury lists there was the use of different colored inks for white and Negro citizens.

There is consequently no resemblance between the unchallenged proof of discrimination by the Board of County Commissioners and the Superior Court of Forsyth County and the failure to establish discrimination in the Walls Case.

II.

The Statutes of North Carolina permitting discrimination against white and Negro citizens in jury selection violate the Fourteenth Amendment of the Federal Constitution.

It is submitted that Chapter 9 of the North Carolina Statutes creates unconstitutional limitations on the selection for grand and petit jurors, as well as talesmen. For example, Section 1 restricts the jury list to taxpayers,

who are either property owners or poll tax payers (Chapter 105, Section 341). Furthermore, poll tax payers include only males between the ages of 21 and 50. Thus, if a male over fifty possesses no property he is excluded from jury service by the terms of the statute. Then Section 11 of Chapter 9 requires that talesmen be freeholders.

As a consequence, the payment of taxes and the possession of property are made prerequisites for jury service, and an entire class of propertyless males over fifty are precluded from jury service. These disqualifications have no reasonable relationship to competency for jury service, but exclude a substantial economic segment of the community from involvement in the trial of causes that may well affect their status. Viewed from the aspect of the accused, defendants from the lowest economic levels of society are confronted with juries that are unrepresentative of the class of persons from which they emerge.

The case at bar represents a vivid example to illustrate how humble toilers may suffer prejudice when tried by jurors whose qualifications include the payment of taxes and the ownership of property. These lowly tobacco workers were involved in a labor dispute that can arouse the emotions of an entire community to a fever pitch and divide its sentiment along strictly economic lines. Can it be said that these defendants could secure a fair trial from a jury that excluded the propertyless?

The Supreme Court of the United States reasoned along similar lines in the case of *Thiel v. Southern Pacific Co.*, 665 Ct. 984, at pages 985 and 986 of the opinion:

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community. . . . This does not mean, of course, that every jury must contain

representatives of all the economic, social, religious, racial, political and geographical groups of the community, frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. To disregard it is to open the door to class distinctions and discriminations which are abhorrent to the democratic ideals of trial by jury. . . . Wage earners, including those who are paid by the day, constitute a very substantial portion of the community, a portion that cannot be intentionally and systematically excluded in whole or in part without doing violence to the democratic nature of the jury system. Were we to sanction an exclusion of this nature, we would encourage whatever desires those responsible for the selection of jury panels may have to discriminate against persons of low economic and social status. We could breathe life into any latent tendencies to establish the jury as the instrument of the economically and socially privileged. That we refuse to do."

See also *Glasser v. U. S.*, 315 U. S. 68, 85, 62 S. Ct. 457.

Chapter 9, *General Statutes of North Carolina*, Section 11, provides that to avoid a defect in the number of available petit jurors the Court may direct the sheriff to summon from the community talesmen who must be freeholders, however; or the Court may have the names of such talesmen chosen from the regular jury box. It was in this connection that the Court requested of counsel for the parties how they preferred to have talesmen chosen, in view of the fact that there would be an obvious shortage in the number of persons available for the petit jury to try the case. This occurred after the Court had overruled the

defendants' motion to quash the jury panel (R. p. 46). Counsel for defendants clearly indicated that because they deemed the jury panel defective in law, as expressed in their motion to quash, they did not care to express any choice but that under the circumstances the choice would be left up to the Court (R. p. 47). Thereupon, the Court directed the Deputy Sheriff to bring in 25 talesmen from the body of citizens in the community (R. p. 46). In the light of these facts, the Court's specific finding in the "Findings of Fact" (R. pp. 46, 47) that counsel for defendants agreed that the Sheriff should summon the talesmen from the community is erroneous. The only significance of this finding is the implication that the defendants might have waived their objections to the validity of the jury panel, and thus the defects may have been cured. Such an implication would be unfounded because no waiver or agreement or consent could be read into the matter since none was intended, as is obvious from the record. Furthermore, the defendants excepted to the Court's instructions to the Deputy Sheriff when he was ordered to bring in the talesmen and the manner thereof (R. p. 46). This exception still stands. Then again, six members of the jury came from the jury panel while six were derived from the talesmen, and thus any alleged consent by defendants pertaining to the method of selecting the talesmen would not cure the method by which the jury panel was created.

Finally, it is submitted that the statute is unconstitutional since it fixes as a prerequisite to eligibility for jury service as talesmen the ownership of real property. This is discriminatory against those who do not own real estate. The same arguments and reasons apply here as were made in connection with the statutes requiring payment of taxes as a precondition for jury service.

III.

The Superior Court of Forsyth County deprived petitioners of constitutional rights under the Fourteenth Amendment of the Federal Constitution in directing the Sheriff to summon a specified number of Negro veniremen.

In ordering the Sheriff to summon 25 talesmen, of whom at least ten should be Negroes, the Court was obviously attempting to remedy the defects of the jury lists by providing for the inclusion of colored persons on the jury panel. The first ground for exception to the Court's action is that the inclusion by summoned talesmen of Negroes on the sworn jury did not cure the regular jury panel vitiated by the unconstitutional discrimination against Negroes. To begin with, six of the jurors impaneled in the instant cause were actually members of the regular panel (R. p. 48) selected in the defective manner already described. This point was passed upon in a very recent decision of the United States Supreme Court—*Thiel v. Southern Pacific Co., Supra.*

In the Thiel case, a passenger on a railroad sued in a Federal Court for personal injuries suffered by him on a train. He moved to strike the jury panel on the ground that there was a deliberate and intentional exclusion from the jury list of persons who worked for a daily wage. Testimony was taken establishing such a practice, but the particular jury which heard the case did have at least five members of the laboring class. The high court reversed the District Court, which had denied the motion to strike the jury panel. The Court stated:

> "It is likewise immaterial that the jury which actually decided the factual issue in the case was found to contain at least five members of the laboring class. The evil lies in the admitted wholesale exclusion of a

large class of wage earners in disregard of the high standards of jury selection. To reassert those standards, to guard against the subtle undermining of the jury system, requires a new trial by a jury drawn from a panel properly and fairly chosen."

An additional objection is that the direction to call a specific number of a certain race for jury service is a direct and open violation of the injunction that a jury must be fairly and impartially drawn from the community, without discrimination. The Fourteenth Amendment operates as a prohibition against the policy or practice of excluding any particular group or class. The Court by directing the selection of at least a fixed number of colored talesmen was in effect setting up a quota for Negro representation on the jury. This does not meet the requirement that a jury shall be fairly and impartially made up out of the whole fabric of the community. (See *Smith v. State*, 45 Tex. Cr. 405, 77 S. W. 453 (1903); 19 Boston Un. Law Rev. 413, 430). Quotas for particular races do not make properly constituted jury lists or panels; it is the bona fide absence of discrimination in drawing up these jury panels in the first instance which makes a fair and impartial jury. Nor does the order of the Court directing the Deputy Sheriff to bring in a certain minimum number of Negroes cure the defective jury panel. Were it to be held otherwise, then a single individual could determine the character and legal constituency of juries and a deputy sheriff could arbitrarily pick and choose those who might be permitted to serve. The Fourteenth Amendment would then become meaningless and mocking words instead of a sacred guarantee that no person shall be denied the equal protection of the laws.

IV.

The white petitioner, Philip Milton Koritz, was deprived of constitutional rights under the Fourteenth Amendment of the Federal Constitution to the same extent as the Negro Petitioners.

One of the defendants, Philip Koritz, is a member of the white race, while the other two defendants are members of the Negro race. The physical difference of race raises no problem of law on the motion to quash the jury panel. Aside from the claim that the action of the Board of County Commissioners in excluding large numbers of white eligible persons from the jury lists worked prejudice to all the defendants, including Koritz, it is also submitted that the unconstitutional method of selecting the jury by systematically excluding colored persons invalidated the jury panel and made it incompetent as to all defendants.

The State requested the consolidation and joint trial of all defendants. If the motion to quash the jury panel because of the illegal and unconstitutional manner of its selection is on firm ground, it follows that the proceedings from there on were superfluous and meaningless and no jury, in legal effect, was eligible to try the consolidated causes.

While the Supreme Court cases, previously cited in connection with the exclusion of Negroes from juries, arise from motions to quash submitted by Negro defendants, there is nothing to indicate that the scope of those decisions is to be thus limited. On the contrary, in *Thiel v. Southern Pacific Co., supra,* the Supreme Court specifically stated that "it becomes unnecessary to determine whether the petitioner was in any way prejudiced by the wrongful exclusion or whether he was one of the excluded class." It was sufficient, the Court said, that "we cannot sanction

the method by which the jury panel was formed in this case." (66 S. Ct., at page 988, and cases there cited.)

Likewise, in *Glasser v. U. S., supra,* the Supreme Court stated that had there been sufficient proof of deliberate selection of juries from a particular private organization of women, the panel would have invalidated because of the exclusion of all women not members of the organization. This apparently would have been true because a fair and impartial jury would have been lacking, despite the fact that the accused was *male.*

In *Ballard v. U. S.*, 67 S. Ct. 261 (1946), the indictment was dismissed as to the *male* and female defendants because of the purposeful and systematic exclusion of women from the panel from which the grand jury was drawn.

The logical basis of these decisions is that the failure to draw a jury impartially and fairly from the community, without the exclusion of any group or class, is deemed prejudicial, irrespective of the particular status of the defendant.

Then, by analogy, it may well be argued that the white petitioner whose union activity was the organization of largely colored workers may have the same interests at stake in procuring a jury free from discrimination that a white citizen has in securing his property from loss by a segregation ordinance. *Buchanan v. Worley,* 245 U. S. 60.

V.

The Petitioners invoked the proper procedure to challenge the validity and constitutionality of the practices used by the County and the Court in drawing and selecting the jury by filing their motion to quash prior to the trial of the cause in the Superior Court of Forsyth County.

The Petitioners' motion properly presented a challenge to the array, raising the question of the invalidity of the

entire jury panel because of exclusionary practices and statutory defects. Numerous cases coming to this Court from common law jurisdictions have used the same procedure. *Hill v. Texas, supra; Norris v. Alabama, supra; Neal v. Delaware, supra.* The State of North Carolina, is a common law jurisdiction (General Statutes of North Carolina, Chapter 4, Sec. 1). Furthermore, in *State v. Kirksey,* 227 N. C. 445, at page 447, the Supreme Court of North Carolina stated:

> "If defendant had wished to take advantage of his objection to the petit jury and special venire, he should have done so by challenging the array, *State v. Douglass,* 63 N. C. 500, and before entering upon the trial of his case."

Likewise, by implication the Supreme Court of North Carolina in the cases of *State v. People's,* 131 N. C. 784, and *State v. Daniels,* 134 N. C. 641, gave its approval to the use of the motion to quash in connection with petit juries as well as grand juries.

It is therefore difficult for the petitioners to follow the reasoning of the Supreme Court of North Carolina in its opinion below where the Court apparently confused a challenge to the array with a challenge to the polls.

The reservation of exceptions to the Court's findings and rulings on the motion, with respect to the regular panel, conclusively establishes that the Petitioners' objections were taken in a proper form and at the proper time.

Similarly, with respect to the summoning of 25 special veniremen, ten of whom were directed to be Negro, by objecting to the Court's order therefor, and reserving exception thereto, the Petitioners unquestionably continued their challenge to the array, as prescribed by North Carolina practice and procedure. Nothing done or omitted to be

done by the Petitioners in any way amounted to consent to the Court's actions, or waiver or abandonment of their constitutional rights.

It is significant that neither the Superior Court of Forsyth County nor the State on appeal made any reference to any possible procedural deficiencies in presenting the questions clearly to the Supreme Court of North Carolina.

The Supreme Court of North Carolina did rule on the Federal questions presented to it, even though it made some comment about Petitioners' failure to exercise a remaining peremptory challenge and the alleged contention of Petitioners with the jury selected and drawn. The Petitioners are unable to comprehend the precise meaning of the Supreme Court of North Carolina in its discussion of the procedural question since the law of North Carolina was carefully followed in presenting the questions, exceptions were duly noted, and none of their rights were waived. The Petitioners are at a loss to understand what more, if anything could have been done by them to raise the questions presented to this court, and to preserve their rights in the premises.

In any event, the Petitioners submit that considerations of insubstantive technical procedure should not preclude this Court from reviewing serious questions affecting basic and fundamental constitutional rights. *Hormel v. Helvering*, 312 U. S. 552.

CONCLUSION.

In the light of the flagrant discriminatory practices outlined in the Petitioners' brief, it is most respectfully urged that no more deserving or appealing cause for review by this Court of violations of the Fourteenth Amendment

could be presented. Because of the inability to secure a trial by a fair and impartial jury, devoid of discriminatory imperfections, three humble workers, white and Negro, will be subjected to harsh and excessive punishment. And beyond the confines of this case, the public officials of Forsyth County will be encouraged to continue their practices of discrimination, which make it impossible for the poor and the lowly of Forsyth County to secure a trial by a jury constitutionally composed of a cross section of the community. This Court should not permit any superficial barriers of technical procedure or vocal denials of discrimination, however cleverly and adroitly planned, to obscure a concealed deprivation of fundamental constitutional rights and prevent their elimination by the mandates of this Court. As stated by this Court in *Smith v. Texas, supra,* page 131, "If there has been discrimination, whether accomplished ingenuously or ingeniously, the conviction cannot stand."

It is respectfully submitted that this case calls for exercise by this Court of its jurisdiction under Section 237(b) of the Judicial Code; and that to such end a writ of certiorari should issue to the Supreme Court of North Carolina.

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OPPOSITION

BRIEF

INDEX

AUTHORITIES CITED

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 234

PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET De GRAFFENREID,

Petitioners,

vs.

THE STATE OF NORTH CAROLINA,

Respondent.

BRIEF OF THE STATE OF NORTH CAROLINA, RESPONDENT, OPPOSING PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioners, Philip Milton Koritz, Cal Roberson Jones, and Margaret De Graffenreid, seek by writ of *certiorari* to have the United States Supreme Court review the decision of the Supreme Court of North Carolina affirming a judgment of the Superior Court of Forsyth County imposing sentence upon the petitioners for wilfully resisting, delaying or obstructing a police officer of the City of Winston-Salem in discharging or attempting to discharge a duty of his office. The opinion of the Supreme Court of North Carolina was filed June 5, 1947, and is reported as STATE v. PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET De GRAFFENREID, 227 N.C. 552.

FACTS

The petitioners were indicted in the Municipal Court of the City of Winston-Salem on warrants charging that the petitioners resisted, delayed or obstructed a police officer of the City of Winston-Salem in discharging or attempting to discharge a duty of his office contrary to a statute of North Carolina. No point was made in this case as to the sufficiency of the warrants based upon the statute. From a conviction in the Municipal Court, the petitioners appealed to the Superior Court of Forsyth County; and from conviction in that Court, the petitioners appealed to the Supreme Court of North Carolina.

These cases grew out of a strike at the plant of the Piedmont Leaf Tobacco Company in Winston-Salem. It appears that for some time there had been a picket line on Third and Fourth Streets near the plant of the Piedmont Leaf Tobacco Company. Prior to August 23, 1946, the picket lines had been breaking so that the trucks could make entry to and from the company property. On the

23rd of August, 1946, a truck was driven up to the picket line west of the Third Street gate. After some conversation between the captains of the pickets, the driver, and an officer by the name of Captain Barlow, the persons in the picket line were told to let the truck in. The defendant Margaret De Graffenreid and the other defendants were asked to move back. The defendant Jones was standing over near or on the sidewalk and insisted on going down to where the pickets or strikers were standing. As a result of interference on the part of all of the defendants, they were arrested; and after some struggle, they were taken to the police station. The facts as to the arrest of Margaret De Graffenreid will be found on R. pp. 50, 51 and 52. The facts as to the arrest of Cal Jones will be found on R. pp. 60 and 61. It appears that his arrest resulted as the result of an order for him to move back since the officers were trying to clear the street and the crowd was slowly moving back under the direction of the officers. It appears that the defendant Koritz intervened in behalf of the defendant Jones, which resulted in his arrest.

ARGUMENT

I

THE METHOD EMPLOYED BY THE COMMISSIONERS OF FORSYTH COUNTY IN THE SELECTION OF THE PETIT JURY IN THE PRESENT CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

The Trial Court and the Supreme Court of North Carolina found that there was no arbitrary, intentional, or systematic discrimination against persons of the Colored race in the selection of the trial jury in this case. These findings are supported by the evidence in the Record.

FAY v. NEW YORK, 91 L. ed. 1517, Decided June 23, 1947;

AKINS v. TEXAS, 325 U. S. 398; 89 L. ed. 1692;

THOMAS v. TEXAS, 212 U. S. 278; 53 L. ed. 512;

STATE v. WALLS, 211 N. C. 487; 191 S. E. 232, Appeal dismissed WALLS v. NORTH CAROLINA, 302 U. S. 635, 82 L. ed. 494.

In AKINS v. TEXAS, *supra*, Mr. Justice Reed said:

> "As will presently appear, the transcript of the evidence presents certain inconsistencies and conflicts of testimony in regard to limiting the number of Negroes on the grand jury. Therefore, the trier of fact who heard the witnesses in full and observed their demeanor on the stand has a better opportunity than a reviewing court to reach a correct conclusion as to the existence of that type of discrimination. While our duty, in reviewing a conviction upon a complaint that the procedure through which it was obtained violates due process and equal protection under the Fourteenth Amendment, calls for our examination of evidence to determine for ourselves whether a Federal constitutional right has been denied, expressly or in substance and effect, Norris v. Alabama, 294 U. S. 587, 589, 590, 79 L. ed. 1074, 1076, 1077, 55 S. Ct. 579; Smith v. Texas, 311 U. S. 128, 130, 85 L. ed. 84, 86, 61 S. Ct. 164, we accord in that examination great respect to the conclusions of the state judiciary, Pierre v. Louisiana, 306 U. S. 354, 358, 83 L. ed. 757, 760, 59 S. Ct. 536. That respect leads us to accept the conclusion of the trier on disputed issues 'unless it is so lacking in support in the evidence that to give it effect would work that fundamental unfairness which is at war with due process'."

In THOMAS v. TEXAS, *supra*, Mr. Chief Justice Fuller observed:

> "As before remarked, whether such discrimination was practised in this case was a question of fact, and the determination of that question adversely to plaintiff in error by the trial court and by the court of criminal appeals was decisive, so far as this court is concerned, unless it could be held that these decisions constitute such abuse as amounted to an infraction of the Federal Constitution, which cannot be presumed, and which there is no reason to hold on the record before us. On the contrary, the careful opinion of the court of criminal appeals, setting forth the evidence, justifies the conclusion of that court that the Negro race was not intentionally or otherwise discriminated against in the selection of the grand and petit jurors. Indeed, there was a Negro juror on the grand jury which indicted plaintiff in error, and there were Negroes on the venire from which the jury which tried the case was drawn, although it happened that none of them were drawn out of the jury box."

The facts in the case of STATE v. WALLS, *supra*, are identical with the facts in the instant case except for the difference in the mathematical ratios. Proportional representation is not required.

AKINS v. TEXAS, 325 U. S. 398; 89 L. ed. 1692;
THOMAS v. TEXAS, 212 U. S. 278; 53 L. ed. 512;
VIRGINIA v. RIVES, 100 U. S. 313; 25 L. ed. 667.

It also appears that the jury which tried the petitioners was selected in accordance with the North Carolina Statutes and was composed of five members of the colored race and seven members of the white race. (R. p. 48.)

II

THE NORTH CAROLINA STATUTES REGULATING THE SELECTION AND QUALIFICATION OF JURORS ARE CONSTITUTIONAL AND THE QUESTION OF THEIR VALIDITY DOES NOT PER SE PRESENT ANY SUBSTANTIAL FEDERAL QUESTION.

The North Carolina Statutes relating to the selection and qualification of jurors make no mention of race as a qualification for jury service. Any person who meets the qualifications prescribed, regardless of race, is authorized to serve on a jury in North Carolina. Since the Statutes do not *per se* discriminate against any person because of race, any Federal question presented is not substantial because it has already been decided adversely to the contentions of the petitioners.

FAY v. NEW YORK, 91 L. ed. 1517, Decided June 23, 1947;

FRANKLIN v. SOUTH CAROLINA, 218 U. S. 162, 54 L. ed. 980;

BUSH v. KENTUCKY, 107 U. S. 110, 27 L. ed. 354;

NEAL v. DELAWARE, 103 U. S. 370, 26 L. ed. 567;

STRAUDER v. WEST VIRGINIA, 100 U. S. 303, 25 L. ed. 664.

III

THE ORDER OF THE TRIAL COURT DIRECTING THE SHERIFF TO SUMMONS ADDITIONAL JURORS INCLUDING PERSONS OF THE COLORED RACE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

It is the settled procedure in North Carolina, expressly authorized by Statute, to summons tales jurors to prevent a defect of jurors. The petitioners, who now complain be-

cause of a lack of Negroes on the jury, present no question for decision by this Court by complaining of the Judge's order directing that a certain number of Negroes should be included in the tales jurors summonsed.

STATE v. LORD, 225 N. C. 354, 34 S. E. (2d) 205;
STATE v. MANSLIP, 174 N. C. 798, 94 S. E. 2;
LUPTON v. SPENCER, 173 N. C. 126, 91 S. E. 718.

This question being disposed of in accordance with settled local procedure, no question is presented for decision by this Court.

VAN OSTER v. KANSAS, 272 U. S. 465, 71 L. ed. 354;
LIBERTY WAREHOUSE CO. v. BURLEY TOBACCO CO-OP. M. ASSOCIATION, 276 U. S. 71, 72 L. ed. 473;
UNITED GAS PUBLIC SERVICE COMPANY v. TEXAS, 303 U. S. 123, 82 L. ed. 702.

The authorities relied on by the petitioners are not in point here for they involved an exercise of this Court's supervisory jurisdiction over proceedings in the Federal Courts. It is strongly intimated in those cases that the doctrine announced therein is inapplicable to juries in State Courts. For example, in McNABB v. UNITED STATES, 318 U. S. 332, 87 L. ed. 819, the following appears:

> "In the view we take of the case, however, it becomes unnecessary to reach the constitutional issue pressed upon us. *For, while the power of this Court to undo convictions in state courts is limited to the enforcement of those 'fundamental principles of liberty and justice,'* HEBERT v. LOUISIANA, 272 U. S. 312, 316, 71 L. ed. 270, 272, 47 S. Ct. 103, 48 ALR 1102, *which are secured by the Fourteenth Amendment, the scope*

of our reviewing power over convictions brought here from the Federal courts is not confined to ascertainment of constitutional validity. Judicial supervision of the administration of criminal justice in the Federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as 'due process of law' and below which we reach what is really trial by force. Moreover, review by this Court of state action expressing its notion of what will best further its own security in the administration of criminal justice demands appropriate respect for the deliberative judgment of a state in so basic an exercise of its jurisdiction. Considerations of large policy in making the necessary accommodations in our Federal system are wholly irrelevant to the formulation and application of proper standards for the enforcement of the Federal criminal law in the Federal courts." (Italics ours.)

FAY v. NEW YORK, 91 L. ed. 1517, Decided June 23, 1947.

IV

THE WHITE PETITIONER, PHILIP MILTON KORITZ, PRESENTS NO QUESTION FOR DECISION BY THIS COURT BECAUSE OF ANY ALLEGED DISCRIMINATION AGAINST MEMBERS OF THE COLORED RACE FOR HE IS NOT OF THAT CLASS.

Since the petitioner, Philip Milton Koritz, is not a member of the colored race, his contention presents no substantial Federal question for decision by this Court insofar as this point is concerned. One cannot be discriminated

against in jury selection unless one is a member of the race or class which one contends is being discriminated against.

FAY v. NEW YORK, 91 L. ed. 1517, Decided June 23, 1947;

See RAWLINS v. GEORGIA, 201 U. S. 638, 640, 50 L. ed. 899, 900;

Compare U. S. v. CHAPLIN, 54 Fed. Sup. 682;

STATE v. SIMS, 213 N. C. 590, 197 S. E. 176;

COMMONWEALTH v. GARLETTS, 81 Pa. Super. Ct. 271;

McKINNEY v. STATE, 3 Wyo. 719, 30 P. 293;

STATE v. JAMES, 96 N. J. Law 132, 114 A. 553;

GRIFFIN v. STATE, 183 Ga. 775, 190 S. E. 2;

STATE v. WALTERS, 61 Idaho 341, 102 P. (2d) 284;

COMMONWEALTH v. WRIGHT, 79 Ky. 22.

V

WHETHER AN EXCEPTION OR ASSIGNMENT OF ERROR IS PROPERLY PRESENTED TO A STATE COURT PRESENTS NO SUBSTANTIAL FEDERAL QUESTION.

Whether or not a question is presented to a State court for decision should be determined by applying State laws and rules of court.

TARRANCE v. FLORIDA, 188 U. S. 519, 47 L. ed. 572.

Headnote number two of TARRANCE v. FLORIDA, *supra,* epitomizing the holding, reads as follows:

> "The settled rule of a state court that objections to the manner of selecting grand jurors on behalf of one who has been indicted by such jurors must be taken by plea in abatement, and not by motion to quash the

venire and panel, is binding on the Supreme Court of the United States on writ of error to the state court."

VI

THE PETITION FOR CERTIORARI PRESENTS NO FEDERAL QUESTION BECAUSE THE QUESTIONS ATTEMPTED TO BE RAISED BY THE PETITIONERS WERE NOT EXPRESSLY OR NECESSARILY DECIDED BY THE SUPREME COURT OF NORTH CAROLINA.

In the instant case the Supreme Court of North Carolina held only that the petitioners had not presented to it for decision any question of discrimination against members of the colored race in the selection of petit juries.

Since the highest court of the State did not expressly or necessarily decide any Federal question attempted to be presented by the petitioners, this court has no jurisdiction to review the decision of the North Carolina Supreme Court.

BROOKS v. MISSOURI, 124 U. S. 394;
WHITNEY v. CALIFORNIA, 274 U. S. 357;
LYNCH v. NEW YORK, 293 U. S. 52;
SOUTHWESTERN BELL TELEPHONE COMPANY v. OKLAHOMA, 303 U. S. 206.

In WHITNEY v. CALIFORNIA, 274 U. S. 357, 360, it is said:

"It has long been settled that this court acquires no jurisdiction to review the judgment of a state court of last resort on a writ of error, unless it affirmatively appears on the face of the record that a Federal question constituting an appropriate ground for such review was presented in and expressly or necessarily decided by such state court."

CONCLUSION

Even if some of the questions set out in the petition are Federal ones, they are not substantial and have been resolved adversely to the contentions of the petitioner and are not of sufficient importance to warrant consideration by the United States Supreme Court. The writ should be denied since, under the rules and decisions of this Court, review on writs of *certiorari* is a matter not of right but of discretion.

UTLEY v. ST. PETERSBURG, 292 U. S. 106;
LEONARD v. VICKSBURG S. & P. R. CO., 198 U. S. 416.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D., 1947

No. 234

PHILIP MILTON KORITZ, CAL ROBERSON JONES, and MARGARET DE GRAFFENREID,
Petitioners,

vs.

STATE OF NORTH CAROLINA,
Respondent.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

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REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

Respondent relies heavily in its brief on the recent decision of this Court in Fay v. New York, 167 Sup. Court Reporter 1613, decided June 23, 1947.

Petitioners submit however that the cited decision not only fails to lend weight to Respondent's contention but strengthens the basic premise of the petition for a writ of certiorari herein.

Respondent claims that the method employed in the selection of the petit jury presents no substantial federal question.

But in Fay v. New York, this Court reiterated (p. 1626, supra):

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years."

The Petitioners submit that the incontrovertible facts of the trial below present the most flagrant discriminatory abuses of the right of a class—the Negro people—to serve on the jury. These practices, the proof showed, persisted for a period of at least ten years.

Moreover, in Fay v. New York, this Court went beyond the doctrine of racial discrimination, which specific statutes prohibit, stating (p. 1628, supra):

> "But this Court has construed it to be inherent in the independent concept of due process that condemnation shall be rendered only after a trial, in which the hearing is a real one, not a sham or pretense * * * Trial must be held before a tribunal not biased by interest in the event * * * Undoubtedly a system of exclusion could be so manipulated as to call a jury before which defendants would have so little chance of a decision on the evidence that it would constitute a denial of due process."

In the Fay case, this Court merely found no evidence of discrimination against a class, as claimed.

If, in the Fay case, evidence had been adduced that for a period of ten years a well-defined class of workers had been systematically denied jury service, then it is inferra-

ble this Court would have regarded the resultant jury panel as defective.

It is true that this Court in the Fay case said, supra, (p. 1627):

> "This Court, however, has never entertained a defendant's objection to exclusions from the jury except when he was a member of the excluded class."

This Court added, however:

> "Nevertheless, we need not here decide whether lack of identity with an excluded group would alone defeat an otherwise well-established case under the Amendment."

The Petitioners urge that, as to the white Petitioner Koritz, his lack of identity with the excluded Negroes should not "defeat an otherwise well-established case under the Amendment." His fate was so inextricably linked with the excluded class, as set forth in detail in Petitioners' brief (p. 46 et seq.), as to effect a denial of an impartially constituted jury for his trial.

Nor do assertions that the questions raised by the petition were not expressly or necessarily decided by the Supreme Court of North Carolina merit serious consideration. Aside from the fact that the Supreme Court of North Carolina most assuredly did pass on the questions presented here, the Fay case passed on the constitutional problems involved even though there were no findings of fact and no opinion thereon by the Court below. This Court said (supra, p. 1620):

> "We would, in any case, be obliged on a constitutional question to reach our own conclusions, after full allowance of weight to findings of the state courts, and in this case must examine the evidence."

CONCLUSION.

Nothing contained in Respondent's brief should lead this Court from the conclusion, as it remarked in the Fay case, "No device, whether conventional or newly devised, can be set up by which the judicial process is reduced to a sham and courts are organized to convict."

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Respondent.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA.

Petitioners respectfully request a rehearing of their petition for a writ of certiorari, which was denied by this Court on October 13, 1947, for the following reasons:

1. The denial of the writ is in flat contradiction to the well-defined principle that exclusion of persons from juries because of race or color violates the Fourteenth Amendment of the Constitution of the United States.

Smith v. Texas, 311 U. S. 128; *Norris v. Alabama,* 294 U. S. 587.

2. There was no contradiction that no more than a dozen colored persons were summoned for jury service over a period of ten years in a county whose population contained over 45% colored citizens. The record was full and complete in proof of this with testimony of many qualified witnesses and exhibits from the local court's own records. All the undisputed facts bear witness to a vicious denial of equal protection of the laws.

3. The trial in Forsyth County of North Carolina was a travesty of justice. Corrupt jury systems and packed juries discredit our whole judicial system. This Court cannot lend its great authority to continued abuse of the right of trial by jury that existed in this cause.

4. The petitioners, for minor offenses, must suffer oppressive punishment because under color of law they were denied the essence of a fair trial. They cannot be alone in the rising bitterness that stems from resentment at the judicial processes sanctioned by law as jury trials in Forsyth County, North Carolina. When the imperatives of the Constitution are cavalierly disregarded, a whole people are excluded from jury service, and the imprimatur of judicial approval is stamped on such mockery of justice, then the faith of our people in our judicial system must inevitably be undermined.

5. The failure of this high Court to accord, at least, the opportunity for hearing of so fundamental an evil, that literally cries for remedy, is disturbing and incomprehensible to Petitioners. To these Petitioners and all the working people of our land this Court represents a bulwark of law and justice. The summary denial of a petition presenting incontrovertible evidence of the most arrogant and brazen violations of the Constitution throws a shadow of fear far beyond the corners of this cause.

The petitioners importune this Court to reconsider most carefully the facts of this cause. Deepest impulses of justice should certainly warrant a full hearing by argument of counsel.

Respectfully submitted,

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